

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI ex rel.	)	
WILBUR SCHOTTEL,	)	
	)	
Relator,	)	
	)	SC 87857
vs.	)	
	)	Clay County Probate Court
THE HONORABLE LARRY D.	)	Case No. CV200-88P
HARMAN, JUDGE, CLAY COUNTY	)	
PROBATE COURT,	)	
	)	
Respondent.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI  
JUDICIAL CIRCUIT, PROBATE DIVISION  
THE HONORABLE LARRY D. HARMAN, JUDGE

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APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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## INDEX

	<u>Page</u>
TABLE OF AUTHORITIES .....	3
JURISDICTIONAL STATEMENT .....	7
STATEMENT OF FACTS.....	9
POINT RELIED ON.....	12
ARGUMENT .....	14
CONCLUSION.....	37
APPENDIX .....	40

## TABLE OF AUTHORITIES

### Page

### CASES:

<i>American Dredging Co. v. Miller</i> , 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285	
(1994) .....	24, 25, 30
<i>Bartak v. Bell-Galyardt, Inc.</i> , 629 F.2d 523 (8th Cir. 1980) .....	28
<i>Benton v. City of Rolla</i> , 872 S.W.2d 882 (Mo. App., S.D. 1994) .....	37
<i>Bethell v. Porter</i> , 595 S.W.2d 369 (Mo. App., W.D. 1980) .....	12, 27
<i>Carmell v. Texas</i> , 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) .....	12, 20
<i>City of Kirkwood v. Allen</i> , 399 SW2d 30 (Mo. banc 1966) .....	15
<i>Commonwealth Department of Agriculture v. Vinson</i> , 30 S.W.3d 162	
(Ken. 2000) .....	28, 29, 30
<i>Cooper v. Holden</i> , 189 S.W.3d 614 (Mo. App., W.D. 2006) .....	33, 34
<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006) .....	15, 35, 36
<i>Gray v. Tyson Foods, Inc.</i> , 46 F. Supp. 2d 948 (W.D. Mo. 1999) .....	28
<i>In the Matter of the Care and Treatment of Morgan</i> , 176 S.W.3d 200 (Mo.	
App., W.D. 2005) .....	18, 19, 20, 21
<i>In the Matter of the Care and Treatment of Norton</i> , 123 S.W.3d 170 (Mo.	
banc 2003) .....	31, 34

<i>In the Matter of the Care and Treatment of Schottel</i> , 159 S.W.3d 836 (Mo. banc 2005) .....	9, 16
<i>In the Matter of the Care and Treatment of Spencer</i> , 123 S.W.2d 166 (Mo. banc 2003) .....	17, 18, 19, 20, 21
<i>La-Z-Boy Chair Co. v. Director of Economic Development</i> , 983 S.W.2d 523 (Mo. banc 1999) .....	33, 34
<i>Leo v. Trevino</i> , 2006 WL 1550839 (Tex. App.-Corpus Christi, June 8, 2006) ....	25
<i>Lucas v. P.C. Hays</i> , 283 S.W.2d 561 (Mo. Div. 1, 1955) .....	26
<i>Menard v. Goltra</i> , 40 S.W.2d 1053 (Mo. Div. 2, 1931) .....	25, 27
<i>Middlewest Motor Freight Bureau v. United States</i> , 433 F.2d 212 (8th Cir. 1970) .....	22, 30
<i>O'Leary v. Illinois Terminal Railroad Co.</i> , 299 S.W. 2d 873 (Mo. banc 1957) .....	12, 26, 27, 30
<i>People v. McRunels</i> , 603 N.W.2d 95 (Mich. App., 1999) .....	23, 30
<i>Redick v. M.B. Thomas Auto Sales, Inc.</i> , 273 S.W.2d 228 (Mo. Div. 1, 1954) .....	25, 26
<i>Richardson v. American Home Shield of Texas, Inc.</i> , 2006 WL 903721 (S.D. Tex. April 7, 2006) .....	22, 23
<i>Scheufler v. General Host Corporation</i> , 895 F.Supp. 1411 (U.S. Dist. Kan. 1995) .....	28

<i>State v. Dionne</i> , 814 So.2d 1087 (Fla. App. 5 <sup>th</sup> District 2002) .....	20, 21
<i>State v. Gouchard</i> , 922 So.2d 424 (Fla. App. 2nd Dist. 2006) .....	28
<i>V.B. v. N.S.B ex rel. P.M.B.</i> , 983 S.W.2d 691 (Mo. App., E.D. 1998) .....	12, 27, 28
<i>Wilkes v. Missouri Highway and Transportation Commission</i> , 762 S.W.2d 27 (Mo. banc 1989) .....	37

### **CONSTITUTIONAL PROVISIONS:**

Missouri Constitution, Article 1, Section 13 .....	12, 14, 15
--	------------

### **STATUTES:**

Section 1.150, RSMo 2000.....	12, 13, 14, 15, 16, 17, 31, 32, 36
Section 632.305, RSMo 2000.....	13, 31
Section 632.325, RSMo 2000.....	13, 31
Section 632.480, RSMo 2000.....	13, 17, 31
Section 632.480, RSMo Cum. Supp. 2003 .....	13, 17
Section 632.486, RSMo 2000.....	31
Section 632.489, RSMo 2000.....	13, 31
Section 632.498, RSMo 2000.....	7, 13, 32, 35, 36

Section 632.498, RSMo Cum. Supp. 2005 .....7, 9, 13, 16, 21, 22, 31, 32, 36

Section 632.498, RSMo Cum. Supp. 2006 .....

.....9, 10, 11, 13, 21, 22, 24, 31, 32, 33, 34, 35, 36

**RULES:**

Rule 53.01 ..... 31

## **JURISDICTIONAL STATEMENT**

On June 25, 2002, Wilbur Schottel filed a petition for discharge from involuntary commitment to the Department of Mental Health as a sexually violent predator. The Honorable Larry D. Harmon of the Clay County Circuit Court denied the petition without submitting the case to a jury, finding no probable cause to believe that Mr. Schottel's mental abnormality has so changed that he is safe to be discharged. This Court reversed Judge Harmon's decision on April 12, 2005, and ordered Judge Harmon to submit the cause to a jury. The jury was unable to reach a unanimous decision on May 12, 2006, and a mistrial was declared. Prior to the re-trial, the Missouri legislature amended Section 632.498, RSMo, to reduce the State's burden of proving Mr. Schottel's mental condition is unchanged from "beyond a reasonable doubt" to "clear and convincing evidence." The amendment also removed complete discharge from commitment upon a finding that Mr. Schottel is safe to be at large, imposing instead continued commitment in the custody of DMH with release from secure confinement upon conditions. Judge Harmon intends to apply the new burden of proof at trial, and to impose the conditional release requirements if the jurors find that Mr. Schottel is safe to be at large. The Western District Court of Appeals denied Mr. Schottel's Petition for Writ of Mandamus to compel Judge

Harmon to apply the law in effect at the time Mr. Shottel filed his petition rather than the provisions of the amended law. This Court sustained Mr. Schottel's Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing and oral argument. Jurisdiction over this matter is given to this Court by Article V, Section 4 of the Missouri Constitution, and Missouri Supreme Court Rules 84.22 to 84.26 and 94.01 to 94.07.

## STATEMENT OF FACTS

Wilbur Schottel stipulated to civil commitment in the Department of Mental Health as a sexually violent predator on June 14, 2000. *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836 (Mo. banc 2005).

On June 25, 2002, Mr. Schottel filed a petition for discharge from that commitment. *Schottel, supra*. The Honorable Larry D. Harman found no probable cause to believe that Mr. Schottel's mental abnormality had so changed that he was safe to be at large, and denied the petition without providing Mr. Schottel a trial before a jury. *Id.* On April 12, 2005, this Court reversed Judge Harman's judgment and remanded the cause for a jury trial. *Id.*

The discharge petition was tried to a jury on May 9 to 12, 2006, but the jurors were unable to reach a unanimous verdict and Judge Harman declared a mistrial. The cause was re-set for trial on June 26, 2006.

Prior to the re-trial, the Missouri legislature amended numerous provisions of the Missouri Revised Statutes relating to sex offenders, including provisions of the Sexually Violent Predator law. House Bill No. 1698. This bill was signed by the Governor on June 5, 2006, and because it had an emergency clause the new laws went into effect immediately.

Under the previous version of Section 632.498, "the burden of proof at trial shall be on the state to prove beyond a reasonable doubt that the committed

person's mental abnormality remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence." 632.498, 2004.

Under the recently passed law, the State's burden of proof has been reduced:

"the burden of proof at trial shall be upon the state to prove by clear and convincing evidence that the committed person's mental abnormality remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence." 632.498, 2006.

If the State failed to meet its burden under the former version of the statute, the committed person was discharged from the commitment to DMH without condition or supervision. 632.498, 2005. Under the amendatory law, if the State fails to meet its burden at the release trial, the person is only released from secure confinement, but remains committed to the custody of DMH and is subjected to lifetime supervision with conditions. 632.498, 2006. Under the former version of the statute, if the committed person was discharged from commitment he could not be returned to the custody of a state agency without a new petition for commitment and a new jury verdict finding that the person meets the requirements of a sexually violent predator. 632.484, 2005. Under the new provisions of the statute the person remains committed to the custody of DMH, and can be returned to secure confinement upon a finding by a probate judge that the person violated a condition of his release. 632.505, 2006.

The State asked Judge Harman to apply the provisions of the amendatory law to Mr. Schottel's pending re-trial of his 2002 petition for discharge. The probate court accepted suggestions from the parties (Writ Petition EXHIBITS 1 and 2) and discussed the matter with counsel in a pre-trial hearing. On June 26, 2006, the probate court ordered that the re-trial will be held under the provisions of the amendatory law. (Writ Petition EXHIBIT 3). The probate court specifically held that the State's burden of proving that Mr. Schottel's mental abnormality remains such that he is not safe to be released is by clear and convincing evidence; and that if the State's evidence fails to meet that standard, Mr. Schottel will be conditionally released as provided in Section 632.505.

Mr. Schottel filed a petition for Writ of Mandamus in the Western District Court of Appeals on July 5, 2006, to preclude Judge Harman from applying the 2006 version of Section 632.498 to this cause of action begun in 2002. *State ex rel. Wilbur Schottel v. Honorable Larry D. Harman*, WD No. 67138. The Western District Court of Appeals held: "notwithstanding the likely meritorious nature of Relator's complaint, that 'adequate relief can be afforded by an appeal,' Rule 84.22(a)" and denied the writ. (Writ Petition EXHIBIT 4).

This Court sustained Mr. Schottel's Petition for Writ of Mandamus on August 22, 2006, issued an alternative writ, and set the cause for briefing and oral argument.

### POINT RELIED ON

The Honorable Larry D. Harman erred in ruling that the amended provisions of the Sexually Violent Predator law, which became effective on June 5, 2006, applied to the trial of Mr. Schottel's petition for discharge from custody filed on June 25, 2002, because applying the amendments to the State's burden of proof and the consequence of the State's failure to meet that burden violate the prohibition against retrospective laws in Article I, Section 13 of the Missouri Constitution and the provisions of Section 1.150, RSMo 2000, in that the burden by which a party must prove its claim is a matter of substantive law, and the imposition of conditional release rather than discharge from commitment imposes a new duty or obligation upon Mr. Schottel not imposed by the statute in effect at the time he filed his petition for discharge.

*Bethell v. Porter*, 595 S.W.2d 369 (Mo. App., W.D. 1980);

*Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000);

*O'Leary v. Illinois Terminal Railroad Co.*, 299 S.W. 2d 873 (Mo.

banc 1957);

*V.B. v. N.S.B ex rel. P.M.B.*, 983 S.W.2d 691 (Mo. App., E.D. 1998);

Missouri Constitution, Article I, Section 13;

Sections 1.150, 632.305, 632.325, 632.480, 632.489, 632.498, RSMo  
2000;

Section 632.480 RSMo Cum. Supp. 2003; and

Section 632.498 RSMo Cum. Supp. 2005, Cum. Supp. 2006.

## **ARGUMENT**

**The Honorable Larry D. Harman erred in ruling that the amended provisions of the Sexually Violent Predator law, which became effective on June 5, 2006, applied to the trial of Mr. Schottel's petition for discharge from custody filed on June 25, 2002, because applying the amendments to the State's burden of proof and the consequence of the State's failure to meet that burden violate the prohibition against retrospective laws in Article I, Section 13 of the Missouri Constitution, in that the burden by which a party must prove its claim is a matter of substantive law, and the imposition of conditional release rather than discharge from commitment interferes with a vested interest and operates in a punitive manner.**

### **Effect of statutory amendment on pending proceeding.**

As a general rule, a statutory amendment has no effect on pending litigation. "[N]or shall any law repealing a former law, clause or provision abate, annul or in any wise affect any proceeding had or commenced under or by virtue of the law so repealed, but the same is as effectual and shall be proceeded on to final judgment and termination as if the repealing law had not passed, unless otherwise expressly provided." Section 1.150, RSMo 2000. While the bill amending the several laws relating to sexual offenders, including the sexually

violent predator statutes, had an emergency clause making them immediately effective upon signing by the Governor, the law did not expressly provide that the new burden of proof in the SVP statutes was to apply in pending actions. Section 1.150 is "intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed." *City of Kirkwood v. Allen*, 399 S.W.2d 30, 35 (Mo. banc 1966). This protection is rooted in the Missouri Constitution: "That no ex post facto law, nor any law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." Article I, Section 13.

An ex post facto law is typically limited to a retrospective law in a criminal rather than civil proceeding. But because of Article I, Section 13, cases discussing ex post facto laws are as equally persuasive here. This Court noted in *Doe v. Phillips*, 194 S.W.3d 833, 849 (Mo. banc 2006), that the same constitutional provision barring ex post facto laws also provides "that no ... law ... retrospective in its operation ... can be enacted." *Id.* This prohibition is broader than the ex post facto laws of most states and of the United States Constitution, and renders the ex post facto prohibition language superfluous. *Id.* at 850.

The constitutional prohibitions against ex post facto and retrospective laws are not absolute. The provisions of Article I, Section 13 of the Missouri

Constitution and Section 1.150 are limited to matters of substantive law and do not operate to limit application of amendatory laws affecting only procedure in pending actions. *Allen*, 399 S.W.2d at 35-36.

Whether an amendment of the burden of proof is to be applied in a pending cause of action was seemingly resolved by this Court in the last appeal in this case, *In the Matter of the Care and Treatment of Schottel*, 159 S.W.3d 836, 845 (Mo. banc 2005). A prior amendment of Section 632.498, RSMo Cum. Supp. 2005 was passed after the briefs were written, and only one week before oral argument in the Western District Court of Appeals. The amendatory language was therefore not addressed in the briefs. The State began its argument in this Court by requesting a remand to the trial court for a new pre-trial hearing under the new burden of proof, or as the State described it, under the law "as it now stands." This oral argument can be accessed, with a subscription, in the archive of oral argument section of the Supreme Court, found at <http://supremecourt.missourinet.com>. This Court found the State's request to be inappropriate, and refused to order a new hearing under the new burden of proof. *Schottel*, 159 S.W.2d, 845.

The effect of a statutory amendment arose in two other SVP cases. These cases involved the use of the amended definition of the statutory term "predatory" in cases filed prior to the amendment of the definition. At the time

the cases were filed the term "predatory" meant "acts directed toward strangers or individuals with whom relationships had been established or promoted for the primary purpose of victimization." Section 632.480(3), RSMo 2000. When the cases were tried the term had been amended to mean "acts directed towards individuals, including family members, for the primary purpose of victimization." Section 632.480(3), RSMo Cum. Supp. 2003.

Nelvin Spencer argued in *In the Matter of the Care and Treatment of Spencer*, 123 S.W.3d 166 (Mo. banc 2003) that Section 1.150 required the use of the former definition because a substantial portion of his defense was to demonstrate that his past behavior was not "predatory" under the former definition. *Id.* at 169. The State contended that the definition conferred no substantive rights but merely clarified the procedure by which to determine what qualifies as "predatory" behavior. *Id.* The State also claimed that because commitment is based on future predatory behavior, whether the past behavior met the new definition of "predatory" was irrelevant. *Id.* This Court held that use of the amended definition was not error because "whether Mr. Spencer's past behavior fit the prior or revised version definition of 'predatory' is irrelevant" to whether he would commit future acts of predatory sexual violence. *Id.* This is not a clear expression by the Court that the amendment was procedural rather than substantive. The Court only said that the past behavior was irrelevant to the

prediction of future behavior. This Court also noted that despite the amendment, both definitions included the same persons as victims and there was "no substantive difference between the two definitions." *Id.* fn. 9. It seems that this Court found the amendment of the definition to be some sort of a "non-substantive irrelevancy" to the case.

The issue next arose in *In the Matter of the Care and Treatment of Morgan*, 176 S.W.3d 200 (Mo.App., W.D. 2005). In *Morgan*, the State agreed that the former version of the definition of "predatory" applied, apparently because the case had been filed prior to the amendment. *Id.* at 205. Morgan's argument was that the State's evidence failed to prove that he was more likely than not to engage in "predatory" acts in the future because his past behavior did not meet the former definition of "predatory." *Id.* at 204. The Western District Court of Appeals noted that regardless of the State's agreement, using the former definition was contrary to *Spencer*. 176 S.W.3d at 205. But since the State had agreed to use the prior definition, the Western District Court of Appeals reviewed the evidence for sufficiency. *Id.* at 208. The specific issue in *Morgan* was that there was no evidence to support a finding of future acts of "predatory" behavior because the past acts did not involve victims "with whom relationships had been established or promoted" for the purpose of victimization as defined by the statute. *Id.* The Court of Appeals noted that the State might have assumed

from *Spencer* that there was no substantive difference between the old and new definitions. *Id.* at 207. The Court of Appeals rejected that assumption, concluding that this Court limited its findings in *Spencer* only to who could be victims of "predatory" acts, but did not extend that same conclusion to the manner in which the person is victimized. *Id.* at 205-207. Thus, the manner in which Morgan behaved in the past was relevant to predicting his future behavior, and the Western District Court of Appeals held that the State's evidence was insufficient to support a verdict that Mr. Morgan was more likely than not to engage in "predatory" acts of sexual violence in the future, involving the establishment or promotion of relationships for the purpose of victimization. *Id.* at 211. But because the State could potentially present evidence within the amended definition authorized in *Spencer*, the Western District Court of Appeals remanded the case for a new trial.

The important feature of these cases is that the amendment affected only the definition of the statutory term "predatory" to describe the type of behavior that came within the term. It did not change the burden of proof by which the State was required to prove that Spencer or Morgan were subject to commitment as sexually violent predators. Before and after the definition was amended, the State still had to prove beyond a reasonable doubt that the men were more likely than not to engage in future predatory acts. The amount of evidence the State

was required to prove in order for its allegations to be sufficient for commitment did not change.

*Spencer* and *Morgan* are similar to a couple of cases originating in Texas and Florida after changes in those state's evidentiary rules. An amendment to the Texas law allowing conviction in a sex case upon uncorroborated testimony of the victim was considered by the United States Supreme Court in *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). The United States Supreme Court noted that the ex post facto clause prohibits a law that alters the legal rules of evidence by permitting less or different testimony to obtain a conviction than was permitted when the particular offense was committed. 529 U.S. at 513. Because a conviction could be had under the amendatory law without the previously required corroboration, the amended rule of evidence resulted in "less testimony required to convict" and violated the ex post facto clause. 529 U.S. at 530. The United States Supreme Court labeled as grossly unfair a law that retrospectively reduces the quantum of evidence necessary to convict or lowers the burden of proof.

The Fifth District of the Florida Court of Appeals stated in *State v. Dionne*, 814 So.2d 1087, 1093 (Fla. App. 5<sup>th</sup> District 2002), that:

*Carmell* teaches, therefore, that when determining whether a rule of evidence implicates the prohibition against ex post facto laws, the key

factor is whether it regulates “the mode in which the facts constituting guilt may be placed before the jury” or whether it is a sufficiency of the evidence rule which “governs the sufficiency of those facts for meeting the burden of proof.” Rules of evidence that fall into the former category may be applied retrospectively; rules that fit into the latter may not.

814 So.2d at 1093. The amended law in Florida permitted admission of a defendant’s confession without the proof of a *corpus delicti* previously required. *Id.* at 1090-1091. The Florida Court found that the amendment did not violate the ex post facto clause because it only changed the procedure for admission of a confession. *Id.* at 1094-1095. The amendment did not lower the burden of proof or lessen the quantum of evidence necessary to meet that burden. *Id.*

*Spencer* and *Morgan* only involved the nature of the evidence the State is required to present in an SVP trial to demonstrate that the person’s conduct is “predatory.” Regardless of the nature of that evidence, the State still had to prove its case by a quantum of evidence beyond a reasonable doubt. Unlike the amendatory law in *Spencer* and *Morgan*, the amendment to Section 632.498 specifically lowers the State’s burden of proof and lessens the quantum of evidence necessary to meet that burden. Not only does this violate the prohibition against retrospective laws, it is, in the words of the United States Supreme Court, grossly unfair.

**The burden of proof necessary to establish the elements  
of a party's claim is substantive, not procedural.**

The recent amendment of Section 632.498 alters the burden of proof by which the State must prove the elements of its allegation that Mr. Schottel remains a sexually violent predator unsafe to be at large by reason of a mental abnormality. That burden of proof is a substantive matter, not a procedural matter, and thus the amendatory law is prospective only, and cannot be applied retrospectively to Mr. Schottel's pending case.

The Eighth Circuit Court of Appeals stated in *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), that the concept of burden of proof varies depending on the circumstances of the issues involved: it is merely a procedural rule when it determines which party has the duty to present evidence on a particular question, but at times it is a far more significant concept involving issues of substantive law. *Id.* at 220. The Court found the burden of proof in the case before it was substantive because it established the standard by which the plaintiff's evidence would be determined sufficient to prevail on its claim. *Id.*

The Texas Court of Appeals noted in *Richardson v. American Home Shield of Texas, Inc.*, 2006 WL 903721 (S.D.Tex. April 7, 2006), that the procedural device

of a class action eliminates the necessity of presenting the same evidence repeatedly in separate actions, but “it does not lessen the quality of evidence required in an individual action or relax substantive burdens of proof.”

These opinions are particularly important to Mr. Schottel’s situation. The State put its evidence to the test before a jury on May 9-12, 2006. It’s evidence failed to unanimously convince the jurors that Mr. Shottel is a sexually violent predator beyond a reasonable doubt. Application of the clear and convincing evidence burden of proof in the re-trial will lower the standard by which the sufficiency of the State’s evidence to prevail on its claim will be judged. This is a substantive change.

The Michigan Court of Appeals had to determine in *People v. McRunels*, 603 N.W.2d 95 (Mich.App., 1999), whether an amendment to the state's insanity defense law effective after the date of the crime but before trial was applicable to the case. The prior statute did not specify the defendant's burden of proof on the insanity defense, so the common law applied to require the defendant to only present some evidence of insanity, after which the State had to prove sanity by proof beyond a reasonable doubt. *Id.* at 98. The amendment made insanity an affirmative defense which the defendant was required to prove by a preponderance of the evidence. *Id.* The State argued that the amendment was procedural rather than substantive because it did not create new rights or

destroy existing rights because the defendant still had the right to claim insanity and the burden of proof was simply a part of the procedure for asserting that defense. *Id.* at 99. The Michigan appellate court disagreed, finding "the amendment was substantive and not procedural, because the prosecutor's burden is lessened and the defendant's burden is increased...." *Id.* at 101-102 (emphasis added). The Court had to turn to foreign jurisdictions because there were no Michigan cases on point, and found that the courts uniformly conclude that changes affecting the burden of proof are substantive and that retrospective application of the changes violates the Ex Post Facto Clause. *Id.* at 99.

Violation of the retrospective prohibition by applying an increase in the defendant's burden of proof may account for why this Court would not remand the cause for a new pre-trial hearing under the increased burden in the last appeal in Mr. Schottel's case. And applying the amendatory language of Section 632.498 lessening the State's burden of proof in Mr. Schottel's upcoming trial also violates the prohibition against retrospective laws.

The United States Supreme Court said in *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), a case involving application of the Jones Act maritime law in a *forum non conveniens* case, that the burden of proof is "a part of the very substance of [the] claim and cannot be considered a mere incidence of a form of procedure." 510 U.S. at 454, 114 S.Ct. at 988. The

Court noted that the doctrine of *forum non conveniens* is nothing more than a venue provision, a matter that goes to the process rather than to substantive rights. 510 U.S. at 453, 114 S.Ct. at 988. The Court further stated that "[u]nlike burden of proof ... and affirmative defenses such as contributory negligence ..., *forum non conveniens* does not bear upon the substantive right to recover...." 510 U.S. at 454, 114 S.Ct. at 988.

The Texas Court of Appeals followed the holding of *American Dredging Co.* in *Leo v. Trevino*, 2006 WL 1550839 (Tex.App.-Corpus Christi, June 8, 2006), a case involving the burden of proof in a 42 U.S.C. Section 1983 action. The Texas appellate court noted the burden of proof is "substantive." *Id.*

The Missouri Supreme Court held in *Menard v. Goltra*, 40 S.W.2d 1053, 1058 (Mo. Div. 2, 1931), a wrongful death suit against an Illinois barge company, that the rules of evidence are a part of the law of the remedy, and the law of the forum, in this case Missouri, controls. The Court included the burden of proof within the "rules of evidence." *Id.* For this reason, Illinois cases on the question of contributory negligence did not apply to the case on appeal because they applied only to the remedial rights of the parties and not to their substantive rights. *Id.*

Division One of the Missouri Supreme Court reached a contrary decision twenty-three years later in *Redick v. M.B. Thomas Auto Sales, Inc.*, 273 S.W.2d

228 (Mo. Div. 1, 1954). The issue was whether the defendant had the burden of proof in Missouri to prove the plaintiff's contributory negligence as a defense. 273 S.W.2d at 232. The plaintiff claimed that the burden of proving his contributory negligence was a procedural matter and rested upon the defendant to prove. *Id.* The defendant claimed that Illinois law controlled the substantive rights of the parties, and that under Illinois law an essential element of the plaintiff's right to recover was the exercise of due care on his part. *Id.* at 232-233. Division One of the Missouri Supreme Court concluded that the Illinois requirement "is substantive, just as much so as is the requirement that plaintiff plead and prove the negligence of the defendant. No one would argue that the latter was not substantive. Both are essential elements of plaintiff's *right to recover* under the law of Illinois." *Id.* at 233 (emphasis in original).

But the very next year, Division One of the Missouri Supreme Court held in an equitable adoption case involving Missouri and Illinois parties that procedural matters include "the rules of evidence, the competency of witnesses, the burden of proof, the weight of the evidence and [] other matters that may relate to the remedy." *Lucas v. P.C. Hays*, 283 S.W.2d 561, 565-566 (Mo. Div. 1, 1955).

The Missouri Supreme Court, sitting en banc, put this issue to rest in its 1957 opinion in *O'Leary v. Illinois Terminal Railroad Co.*, 299 S.W.2d 873 (Mo.

banc 1957). The plaintiff argued that burden of proof is a rule of evidence which is procedural and not substantive. 299 S.W.2d at 875-876. In rejecting plaintiff's argument, the Missouri Supreme Court recognized that was the rule expressed in *Menard, supra.*, but held in *O'Leary*, that the rule was "clearly erroneous and manifestly wrong." *Id.* at 878-879. The Court expressly overruled *Menard*. *Id.* at 879.

More recent cases from the Western District and Eastern District Courts of Appeals further demonstrate that burden of proof is now clearly established in Missouri as a matter of substantive law and not simply a matter of procedure. The Western District Court of Appeals had to determine in *Bethell v. Porter*, 595 S.W.2d 369 (Mo. App., W.D. 1980), how a decision rendered by this Court after the trial on appeal affected its determination of the claim on appeal. *Id.* at 374. Because this Court stated in its opinion that it was not changing the burden of proof in contract actions, the Western District concluded that the opinion made no substantive changes in the law. *Id.* This decision necessarily indicates that burden of proof is a matter of substantive law, not procedural law.

At the time the respondent in *V.B. v. N.S.B ex rel. P.M.B.*, 983 S.W.2d 691, 692 (Mo. App., E.D. 1998), filed his answer and request for jury trial in this paternity action a statute permitted him a jury trial. That statute was amended prior to trial to deny a jury trial, and the trial court refused his request for a jury

trial. *Id.* Respondent argued that the prior statute allowing a jury trial remained in effect throughout his proceedings regardless of the statutory amendment. *Id.* The Court held that the amendment was procedural, not substantive, and that it was not error to deny respondent a jury trial. *Id.* 693. The Court noted that the statute did not change the petitioner's burden of proof. *Id.*

In *Gray v. Tyson Foods, Inc.*, 46 F. Supp.2d 948 (W.D.Mo. 1999), the federal district court said that "the proper burden of proof is an issue of substantive law not a procedural issue." The United States District Court in Kansas said in *Scheufler v. General Host Coporation*, 895 F.Supp. 1411 (U.S.Dist.Kan. 1995) that "burden of proof is a substantive matter...." The Eighth Circuit court of Appeals said the same in *Bartak v. Bell-Galyardt, Inc.*, 629 F.2d 523 (8th Cir. 1980).

The trial court failed to submit a required instruction in *State v. Gouchard*, 922 So.2d 424 (Fla.App. 2nd Dist. 2006). In weighing the resulting harm, the appellate court distinguished between instructions dealing with procedural or housekeeping matters from those addressing "the elements of the charges, defenses, the burden of proof, or other substantive matters." 922 So.2d at 429, fn 4.

The plaintiff in *Commonwealth Department of Agriculture v. Vinson*,<sup>30</sup> S.W.3d 162 (Ken. 2000), brought a wrongful discharge suit under the state's whistleblower statute. At the time the plaintiff filed his action, the statute

required him to prove his claim by clear and convincing evidence. *Id.* at 163-164. The amendment required the plaintiff to prove his claim by a preponderance of the evidence, and required the defendant to prove an affirmative defense by clear and convincing evidence. *Id.* at 169. The statute was amended shortly before suit was filed, but did not become effective until after the suit was filed. *Id.* at 168. The amended statute changed the weight of evidence the employee must produce, and imposed a new burden of proof upon the employer to successfully defend against the claim. *Id.* at 169. Citing foreign cases because there was no applicable Kentucky case law, the Kentucky Supreme Court held that laws relating to burden of proof constitute substantive, not procedural law. *Id.* at 169-170. That being so, the amendatory law should not have been applied at trial. *Id.* at 169.

Application of the amended language, not effective until June 5, 2006, violates Mr. Schottel's right to be free from retrospective application of the law because it lessens the burden of proof upon which the State may continue Mr. Schottel's commitment to secure detention from proof beyond a reasonable doubt to proof by clear and convincing evidence. The State failed to meet its burden once upon the higher standard and it should not be allowed a second attempt under a lower standard of proof simply by the good fortune that it, the State, amended the statute to lower its burden of proof. The burden of proof is "a

part of the very substance of [the] claim and cannot be considered a mere incidence of a form of procedure." *American Dredging Co. v. Miller*, 510 U.S. at 454, 114 S.Ct. at 988. A statutory amendment lessening the government's burden of proof is substantive, and retroactive application of the amended burden of proof violates the prohibition against retrospective application of the law. *People v. McRunels*, 603 N.W.2d at 99, 101-102. The burden of proof is substantive, "just as much so as the requirement that plaintiff plead and prove" its claim. *O'Leary v. Illinois Terminal Railroad Co.*, 299 S.W. at 877. The burden of proof is substantive because it establishes the standard by which the plaintiff's evidence is determined sufficient to prevail on its claim. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212. A change in the burden of proof made after suit is filed but after the cause is tried cannot be applied retrospectively. *Commonwealth Department of Agriculture v. Vinson*, 30 S.W.2d at 163-164, 169. The provisions against retrospective laws in the Missouri Constitution requires the trial to be held according to the provisions of the statute in effect at the time the proceedings began, establishing the State's burden of proof to be proof beyond a reasonable doubt.

Mr. Schottel must correct a mischaracterization of the legal issue presented by the State in the probate court and in its Answer to Mr. Schottel's Petition for Writ of Mandamus. The State suggests that applying the amendatory language

to the re-trial is prospective, not retrospective, because the re-trial is pending in the future. (Writ Petition EXHIBIT 2, A-22, Answer SC87857). This mischaracterizes the legal meaning of the term “proceeding.” A civil action is commenced by filing a petition with the court. Rule 53.01. The appellant in *In the Matter of the Care and Treatment of Norton*, raised an equal protection challenge because he was not afforded counsel during the End of Confinement interview before the commitment petition was filed against him. 123 S.W.3d 170, 172 (Mo. banc 2003). The appellant noted that persons subjected to general civil commitment under Chapter 632 are afforded counsel immediately upon detention. *Id.* This Court found no equal protection violation because the right to counsel attached in both situations at the same time in the proceedings. *Id.* A person subject to general civil commitment is entitled to counsel after a written application for detention and evaluation is filed in the probate court. Section 632.305, 632.325. A person civilly committed as a sexually violent predator is afforded counsel after the commitment petition is filed. Section 632.486, 632.489. This Court noted that when the State filed its petition against Norton, “[t]his initiated the ‘proceedings’ pursuant to sections 632.480 to 632.513.” *Id.*

The proceeding involved in this appeal was initiated on June 25, 2002, when Mr. Schottel filed his petition for discharge under Section 632.498. Thus, the provisions of Section 1.150 were invoked on June 25, 2002, such that no “law

repealing a former law” shall “abate, annul or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed.” The re-trial may occur in the future, but for purposes of Section 1.150 that re-trial is only a part of the proceeding that commenced four years ago. Section 1.150 further contradicts the State’s position that a future trial is the “proceeding” at issue: the repealed law “is as effectual and shall be proceeded on to final judgment ... as if the repealing law had not passed.” (emphasis added). The emphasized language makes the legislative intention clear that the “proceeding” governed by 1.150 is the entire period and all the activity from the filing of the petition to the final judgment.

**Amendment of the result of the State's failure to prove  
that Mr. Schottel's mental abnormality remains such  
that he is not safe to be at large also violates the prohibition  
against retrospective laws in the Missouri Constitution.**

Under the former provisions of Section 632.498, those in effect at the time Mr. Schottel filed his petition for discharge, if his mental abnormality has so changed that he is safe to be at large he is discharged from the commitment to

DMH. This discharge is complete and unconditional. He is no longer committed to any state agency's custody. His liberty has been completely and unconditionally restored. He cannot be recommitted to the custody of DMH without a new petition and a new jury verdict finding that he meets the criteria of a sexually violent predator.

Under the amendatory law, if the State fails to establish, by any standard, that Mr. Schottel's mental abnormality remains the same, Mr. Schottel is only allowed out of secure confinement, but he remains committed to DMH and his liberty is only partially restored because he is released with conditions and supervision. 632.498, 2006; 632.505, 2006. He is not discharged from the custody of a state agency, and he can be returned to secure confinement by a determination of a trial judge that he has violated a condition of his release.

The State argued below that Mr. Schottel does not have a vested right to unconditional release, and that the release conditions imposed by the amendatory law can therefore be applied retrospectively. The State based its argument on *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523 (Mo. banc 1999) and *Cooper v. Holden*, 189 S.W.3d 614 (Mo. App., W.D. 2006). (Writ Petition EXHIBIT 2, A-25). These cases do not support the State's position that the retrospective application of release conditions is proper

in this case. In those cases, neither appellate had a vested right that was removed or diminished by the statutory amendments.

The company in *La-Z-Boy* claimed a vested interest in a ten year tax exemption under a former law, reduced by the amendatory law. 983 S.W.2d at 525. This Court disagreed because the language of the amended statute established the tax exemption for “a period not to exceed ten years.” *Id.* This language implied that the tax break could be for less than ten years, and thus the exemption period was indefinite, indeterminate, and had not vested. *Id.* The appellant in *Cooper* claimed the right to conditional release calculated on a repealed law rather than an amendatory law. 189 S.W.3d at 617. The Western District Court of Appeals disagreed because the appellant was not entitled to a conditional release date under the repealed law since his crime was a dangerous felony, for which a CR date was not permitted. *Id.* And because the appellant did not have the right to a CR date, he had no substantive right which was affected by the amendatory law.

To the contrary, the amendment of Section 632.498 to subject Mr. Schottel to conditional release impairs his vested and substantial rights, and cannot be applied retrospectively. Civil commitment impinges on the fundamental right of liberty. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d at 173. Mr. Schottel’s right to be unconditionally released from commitment to DMH if

the State failed to meet its burden of proof under Section 632.498 vested as soon as he filed his petition in 2002. The “proceeding” was initiated on that date and the law in effect on that date remains effectual and controlling on the case until final judgment. Under that law, Mr. Schottel was entitled to unconditional discharge upon the State’s failure to prove its case against him. That entitlement has been eliminated in the amendatory law.

This Court reviewed the retrospective application of another portion of House Bill 1698, the registration requirements for certain convicted sex offenders, in *Doe v. Phillips, supra*. Relevant to the question presented in Mr. Schottel’s case, this Court reiterated that a retrospective law is one which imposes a new duty or attaches a new disability with respect to transactions or considerations already past. 194 S.W.3d at 850. This Court held that the 2006 amendments could not be imposed against the Does, with one exception, because the obligation to register under Missouri’s “Megan’s Law” imposed a new duty or obligation. *Id.* at 852. Under this Court’s analysis, only the person convicted after 1995, the effective date of the original “Megan’s Law,” could be subject to the amendatory law. *Id.*

But this Court further found that the 2006 amendment actually removed the registration requirement imposed on that person by the 1995 version of the law, rendering her claims moot. *Id.* at 847. Thus, the 2006 amendment actually

eliminated at duty or obligation upon this person rather than imposing a new duty or obligation. The situation is exactly the opposite in Mr. Schottel's case. Under the prior versions of Section 632.498 he was entitled to complete discharge upon the State's failure to prove beyond a reasonable doubt that he remains unsafe to be at large. The 2006 amendment imposes new duties and obligations upon Mr. Schottel, continued commitment with conditional release, upon the State's failure to prove that he is unsafe to be at large. In contrast with Jane Doe III in *Doe, supra.*, the 2006 amendment imposes new duties and obligations on Mr. Schottel that did not exist when he filed his petition for discharge four years ago. Application of the new duties and obligations of the 2006 amendment is unconstitutionally retrospective.

The State claimed below that "Respondent had neither obtained his release at the time of the legislative amendment, nor had he been given a release date *or an explicit guarantee that his release would be without conditions.*" (Writ Petition EXHIBIT 2, A-25) (emphasis added). Mr. Schottel disagrees with this emphasized language. When he filed his petition for discharge, four years ago, Section 632.498 guaranteed his unconditional discharge from commitment to a state agency if the State failed to prove its case. Can the State change the law any time it wants? Sure. But the law also says that a proceeding already begun continues unaffected by the State's change in the law. Section 1.150.

The State defended retrospective application of the conditional release provisions of the amendatory law by claiming: “the legislature articulated a clear, remedial purpose that necessarily applies to those presently committed as sexually violent predators.” (Writ Petition EXHIBIT 2, A-24). Mr. Schottel believes that the State chose this language because a statutory provision that is remedial operates retrospectively. *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27 (Mo. banc 1989). But as with the term “proceeding,” the State mischaracterizes the legal meaning of the term “remedial.” A remedial statute is not one that simply remedies, or corrects, what the State perceives to be a problem, a weakness, or a shortcoming in the law. A remedial statute is one that provides a remedy for an existing cause of action otherwise barred by operation of law. *Wilkes, supra.*; *Benton v. City of Rolla*, 872 S.W.2d 882, (Mo. App., S.D. 1994). The amendatory law is not “remedial” in a legal sense, and may not be applied retrospectively to impair an existing right.

## CONCLUSION

For all the reasons set forth above, Mr. Schottel prays this Court for its Writ of Mandamus ordering the Honorable Larry D. Harman to apply the provisions of the former law in the pending retrial of Mr. Schottel's petition for discharge.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,047 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 20th day of September, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

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Emmett D. Queener

# APPENDIX

## TABLE OF CONTENTS TO APPENDIX

	<u>Page</u>
Writ Petition Exhibit 1 (Respondent's Motion to Apply Provisions of Section 632.498, RSMo 2000) .....	A-1
Writ Petition Exhibit 2 (State' Motion to Apply Provisions of Section 632.498, RSMo Cum. Supp. 2006) .....	A-19
Writ Petition Exhibit 3 (Order of Probate Court).....	A-29
Writ Petition Exhibit 4 (Order of Western District Court of Appeals) ...	A-30
Section, 632.498, RSMo 2000.....	A-32
Section, 632.498, RSMo Cum. Supp. 2005 .....	A-33
Section, 632.498, RSMo Cum. Supp. 2006 .....	A-34
Section, 632.505, RSMo Cum. Supp. 2006 .....	A-35